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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-125

ALAMO LAND & CATTLE CO., INC.,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

BRIEF OF RESPONDENT

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-vs-

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INDEX

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	4
ISSUES PRESENTED	14
ARGUMENT	
I	
WHEN SCHOOL TRUST LANDS ARE TAKEN BY EMINENT DOMAIN, THE TRUST MUST BE COMPENSATED FOR THE TOTAL FULL APPRAISED VALUE OF THE LAND TAKEN BY THE FEDERAL GOVERNMENT	15
II	
THE LESSEE OF ARIZONA'S SCHOOL TRUST LANDS HAS NO COMPENSABLE INTEREST IN LEASED LANDS WHEN SAID LANDS ARE ACQUIRED BY CONDEMNATION PROCEEDINGS	25
III	
UNDER SPECIFIC PROVISIONS OF THE LEASE A LESSEE OF ARIZONA'S SCHOOL TRUST LANDS IS PRECLUDED FROM CLAIMING A COMPENSABLE INTEREST IN THE SUBJECT PROPERTY (OTHER THAN FOR IMPROVEMENTS) WHEN THE LAND IS ACQUIRED BY CONDEMNATION	
IV	
IF LESSEE HAS A COMPENSABLE INTEREST IN STATE SCHOOL TRUST LANDS, THE EXTENT OF THE LESSEE'S AWARD MAY NOT BE BASED ON A PROBABLE OR ANTIFIPATED RENEWAL OF AN EXISTING LEASE ON SCHOOL TRUST LANDS	49
CONCLUSION	58

CASES AND AUTHORITIES CITED

Case	Page
Burns Trading Copr. v. Blue Front Market 85 A.2d 320 17 N.J. Super. 61 (1951)	27
City of San Antonio v. Guadelupe-Blanco River Authority 191 S.W.2d 118 (CA Texas)	27
Ehle v. Tenney Trading Co. 56 Ariz. 241 107 P.2d 210 (1940)	30
Farmers Investment Co. v. Pima Mining Co. 111 Ariz. 56 523 P.2d 487 (1974)	32
Hartman v. Drake 87 N.W.2d 895 166 Neb. 87 (1958)	27
Hecketsweiler v. Parrett 200 P.2d 971 185 Or. 46 (1948)	27
Hunter v. U.S. 159 Ct. Cl. 356 (1962)	25
Lassen v. Arizona 385 U.S. 458 87 S.Ct. 584 17 L.Ed.2d 515 (1967)	17,18,19,21,22,23, 23,24,32,33,37,49,58
Manning v. Perry 48 Ariz. 425 62 P.2d 693 (1936)	28,36,37

Case	Page
Nebraska v. Platte Valley Public Power Irrigation Dist. 147 Neb. 289 23 N.W.2d 300 166 A.L.R. 1196	51
Nebraska v. U. S. 164 F.2d 866 (CA 8) cert. denied 334 U.S. 351 (1948)	30,32
Olsen v. U. S. 67 F.2d 24 aff'd 292 U.S. 247 54 S.Ct. 704 78 L.Ed. 1236	51
Ramsey v. United Mine Workers of America 401 U.S. 302 91 S.Ct. 658 28 L.Ed.2d 164 On remand 481 F.Supp.1029 Appeal after remand 414 U.S. 1067 94 S.Ct. 576 39 L.Ed.2d 473 Sylabus 4, 91 S.Ct. 658	42
State ex rel State Highway Comm'n v. Chavez 77 N.M. 104 419 P.2d 759 (1966)	33
State ex rel Hwy. Comm'n v. Chavez 80 N.M. 394 456 P.2d 868 (1969)	33
Scully v. U.S. 409 F.2d 1061 (CA 10 1969)	51,52

Case	Page
U. S. v. 15.3 Acres of Land 154 F.Supp. 770 (D.C. Pa. 1957)	45
U.S.A v. 78.61 Acres of Land 265 F.Supp. 564 (D. Neb. 1967)	32
U.S. v. Honolulu Plantation Co. 182 F.2d 172 (CA Hawaii 1950) cert. denied 340 U.S. 820 71 S.Ct. 51 95 L.Ed. 602	25
U.S. ex rel Tennessee Valley Authority v. Birmingham Ferry Co. 79 F.Supp. 569 (D.C. Ky. 1948)	45
U.S. v. Certain Property Located in Borough of Manhattan 344 F.2d 142 (CA 2 1965)	58
U.S. v. Fuller 409 U.S. 488 93 S.Ct. 801 356 L.Ed.2d 16 (1973)	37,39,42,48
U.S. v. Petty Motor Co. 327 U.S. 372 66 S.Ct. 596 90 L.Ed. 727 (1946)	25,47,52
Welch v. Tennessee Valley Authority 108 F.2d 95 cert. denied 309 U.S. 648 60 S.Ct. 889 84 L.Ed. 1030	51

Authorities	Page
Am.Jr., Eminent Domain, § 240	51
Arizona Constituion, Art. 10	15
Nebraska Enabling Act, §7	31
New Mexico-Arizona Enabling Act §28	15.16,26,33,38,40,49
2 Nichols, Eminent Domain § 5.1[3]	25,43
Arizona Revised Statutes	
§ 12-1201	40,41
§ 12-1202	40,41
§ 37-231	25
§ 37-232	38
§ 37-233	38
§ 37-242	20,47
§ 37-284	35
§ 37-285	50
§ 37-288	36
§ 37-291	37
§ 37-293	36,47
§ 41-511.06	34

PRELIMINARY STATEMENT

On May 31, 1966, the United States filed a Notice of Condemnation in the United States District Court of Arizona, and the Court entered an Order for Delivery of Possession. Among the parcels included in the declaration of taking were those designated as Tracts 304 and 305, more particularly described as follows:

TRACT 304

All of Section 2, Township 10 North, Range 13 West, Gila and Salt River Base and Meridian, in the County of Yuma, State of Arizona.

TRACT 305

All of Section 36, Township 11 North, Range 13 West, Gila and Salt River Base and Meridian, in the County of Yuma, State of Arizona.

The lands described above are part of the grant to the State of Arizona by the United States under Sec. 24 of the New Mexico-Arizona Enabling Act (Act June 20, 1910, 36 U.S. Stat. 557, 568-579, Vol. 1, Arizona Revised Statutes, pages 79-93). The lands were granted for the support of the common schools and are subject to the specific restrictions of Sec. 28

of said Enabling Act.

On February 8, 1962, the land was leased by the Arizona State Land Department to Alamo Land and Cattle Company, Inc., (hereinafter referred to as "Alamo"), under a ten year Grazing Lease. (Ex. B, R. 182-186). At the time of the taking the land was being used for grazing purposes by Lessee ("Alamo").

On September 13, 1971 and February 11, 1972, respectively, the Respondent herein, State of Arizona (hereinafter referred to as "Arizona"), and the Petitioner Alamo, separately stipulated with the United States of America that full just compensation for the taking of the property, together with all improvements thereon and appurtenances thereunto belonging, was the sum of $48,220.00 for Tract No. 304 and the sum of $70,400.00 for Tract No. 305, or a total of $118,600.00 (rounded) for said tracts, including improvements.

On March 3, 1972, a distribution hearing was held before the Honorable Walter E. Craig, Judge, United States District Court for Arizona. The

only parties appearing and claiming an interest in the award were Arizona, claiming title through the above referenced Enabling Act grants, and Alamo, claiming a compensable leasehold interest in the land as well as a compensable interest in the value of the improvements. Arizona conceded that a lessee is entitled to receive the value of the improvements, but contested a lessee's right to participate in the award for land value.

After the hearing and consideration of legal memoranda submitted by the parties, the District Court of Arizona entered an opinion and judgment awarding Arizona the sum of $57,970.00 for its fee interest in the subject property and awarding the Lessee Alamo the sum of $3,600 for its improvements and $57,049 for its leasehold interest and reasonably prospective leasehold interest.

The State of Arizona appealed the opinion and judgment to the United States Court of Appeals for the Ninth Circuit which issued its

opinion on March 28, 1974, reversing the decision of the District Court. A motion for rehearing by Alamo was denied May 17, 1974.

Alamo filed a timely Petition for Writ of Certiorari docketed with the Supreme Court on August 15, 1974, which petition was granted.

STATEMENT OF FACTS

The lands being acquired by the United States in this condemnation action described as Tracts 304 and 305 are part of the grant to the State of Arizona by the United States under Sec. 24 of the New Mexico-Arizona Enabling Act. The lands were granted for the support of the common schools and are subject to the specific restrictions and conditions contained in Sec. 28 of said Enabling Act.

On February 8, 1962, the land was leased by Arizona to Alamo under a ten-year grazing lease. (Ex. B., R. 182-187).

After the land was acquired by declaration of taking, Arizona and Alamo each independently

stipulated that the value of Tracts 304 and 305 amounted to the sum of $118,600. (R. 156). The question before the District Court at the distribution hearing was how the funds should be distributed between Arizona (owner/lessor) and Alamo (lessee). The position of Arizona was and is that, as a matter of law and fact, Arizona as owner of the school trust property must receive the full appraised value of the land in question as full just compensation for the taking and that the lessee is entitled to receive only the value of any improvements placed on the land. Alamo claimed a compensable interest in the land.

The only appraisal of the property before the court was that prepared by federal government appraiser Robert A. Rowe and is the appraisal, the same appraisal, on which the stipulations as to compensation were based. The appraisal report was admitted into evidence without objection. (T. 95). The Rowe appraisal appraised only the sections of state land. Alamo's private land and the cattle operation were not included as part of the "larger

parcel" for appraisal purposes nor were any of the federal permit lands included in the appraisal. The Rowe appraisal concluded the highest and best use of the land was agricultural and recreational purposes for the lower land area, and grazing for the higher, more barren land area. Contrary to the observation made by Alamo on page 8 of its Opening Brief, there is no evidence to rebut Rowe's conclusions regarding the highest and best use. Under lease provisions, however, the lessee was precluded from utilizing the land for other than grazing purposes. Mr. Rowe in his appraisal arrived at the following conclusions of value:

Tract 304 Estimated Value of Total Non-Federal Bundle of Rights is:

642,42 Acres at $75 = $48,219 (including all lessee's interests) = $48,220

Division of Lessee's Interest Market Value on Transfer:

Old Well	$100
1 Mile New Fence (3 yrs. old) (not on boundary)	$500
4-strand barbed wire with metal posts at 30' intervals; 3 wire stays between posts; (3 yrs. old)	
Leasehold bargain due to formula rental being below market (carrying capacity unit & percent of last years's cattle price)	$200

Total Lessee's Interest:		$ 800
Total Interest of the State:		$47,420
	($73.74 per acre)	

Tract 305 Estimated Value of Total Non-Federal Bundle of Rights is:

640 Acres at $110 per acre (including all lessee's interest)	$70,400

Division of Lessee's Interest Market Value on Transfer:

House, cookhouse, spring development, & pipe to house	$2,000
Fence (over 1 mi. 4-strand barbed wire with metal posts at 30' intervals; 3 stays btwn. posts	$ 500
Clearing-10 Acres at $50 per acre	$ 500
Bargain in leasehold resulting from less than market charge on formula rent (based on carrying capacity & percent adjusted for mkt. price of cattle per year)	$3,000
Total Lessee's Interest:	$ 6,000
Total Interest of the State:	$64,400

(Ex. D, p. 9)

The State's witness, Mr. William Fish, a review appraiser, concurred with the distribution set forth in the appraisal with one exception; he concluded that the Lessee is entitled only to the value of the improvements and the State is entitled to receive the full appraised value of the land. The Rowe appraisal allocation of $200 for Tract 304 and $6,000

for Tract 305 to Alamo for the bargain in the leasehold was thereby disputed. Mr. Fish's conclusion is supported by specific provisions of the lease which are quoted infra, and Sec. 28 of the New Mexico-Arizona Enabling Act.

Alamo presented a witness by the name of W. D. Davis. Mr. Davis did not appraise the property, but only gave testimony regarding distribution. Mr. Davis arrived at his distribution conclusion by projecting an anticipated renewal of the grazing lease for three additional ten-year periods, adding this to the 6 years left to run on the current lease. He then capitalized the State's income stream from rental receipts and concluded that the balance of the condemnation award should go to Alamo. Under Mr. Davis' theory Arizona was entitled to receive $44,220 and Alamo, as lessee, would be entitled to receive the balance of the award, or $70,296 for its leasehold tenancy and $3,600 for the improvements on the land in question. (T. 41-45).

That school trust lands are leased for grazing

purposes at a rate which does yield economic return when considering the market value of the land is undisputed. The subject leased land for grazing purposes has a carrying capacity of 8 animal units. (T. 72). The Lessee Alamo is precluded by specific lease provision, through statutory incorporation from using the land for any purpose other than grazing. (Ex. B, p. 1), Arizona Revised Statutes § 37-281.D.

On cross examination Mr. Davis indicated that appraisals and sales of ranches are commonly based on the per animal unit carrying capacity of the ranch. (T. 73). He testified concerning several sales of ranches involving State land, Bureau of Land Management land and fee land. (T. 67-73). The value that the animal unit carrying capacity on unirrigated State and Bureau of Land Management land contributed to the sale price of ranches ranged as follows:

Sale	Year	BLM & State Lease Land Value Per Animal Unit	
Linton/Knight	1966	$225	(T. 67)
Beck/Rudolph Chev.	1968	389	(T. 70)
Dodson/Ft. Rock Grazing Assn.	1967	400	(T. 71)
Ft. Rock Grazing Assn./_____	1970	514	(T. 71)
Miller/Pierce Farms	1968	703	(T. 71)

An examination of sales of ranches involving State lease lands shows State land contributes a maximum of $703 per animal unit carrying capacity. Applying this value to the subject property's carrying capacity of 8 animal units, the maximum market value of Lessee's grazing rights amounts to $5,624. (T. 73).

Further, on cross examination Mr. Davis was questioned concerning the application of the market value carrying capacity appraisal approach to his conclusions of the value of the leasehold, as follows:

> Q. In your direct testimony you indicated that the leasehold estate and the land itself was $70,296.38; is that correct?
>
> A. In utilizing the agreed upon settle-

ment with the United States as $118,620, then the value of the leasehold estate in my judgment is $74,400.

Q. Taking the figure that is based on the agreed upon price and the appraisal that was used to justify this stipulation, taking the $70,296.38 attributed to the land value of what you claim to be the lessor's interest, would you divide that amount by 8 animal units?

(Pause)

A. Divided by 8 animal units, this is $8,787.04 per animal unit.

Q. Are you aware of any sale of any property in Arizona which has the highest and best use of ranching operation that has sold for anywhere near $8700 an animal unit?

A. I have no knowledge of any sale that is even remotely close with full fee simple title of all interest and improvements and everything else for anything like that figure. (T. 73-74)

And Mr. Davis further testified:

Q. Isn't it true, Mr. Davis, that in the sale of ranches that the per unit carrying capacity of private ranches usually sell, where only private fee land is involved, usually sell for more than ranches where the major portion of the interest is state or federal?

A. They do, of course, on an animal unit basis sell for more on the deeded land portion than they do on the leased land portions.

Q. You have looked at this whole thing from a total standpoint of the ranch as the large parcel?

A. That is correct.

Q. Based on this concept, could you conceive that of a sale of the ranch based on $8700 per animal unit under the circumstances of the ranch?

A. I don't believe there would be any possibility of a sale at that rate of the ranch of any part of it.

(T. 83-84).

Upon request of Judge Craig a capitalized value of the Lessor-Lessee interest based on a probable lease extension of 26 years (the remainder of the existing lease plus two 10-year extensions), a 16 year probable lease period (remainder of lease plus one extension), and, at request of counsel, a probable lease period of 6 years (until the end of the present lease). The resultant testimony may be summarized as follows:

Lease Term	Lessor's Land Value	Lessee's Land Value	Value of Improvements
26 yrs.	$59,970	$57,049	$3,600
16 yrs.	75,325	43,300	3,600
6 yrs.	95,100	19,936	3,600

(T. 96-99)

The District Court rejected Arizona's argument that a lessee of school trust land under the lease and Sec. 28 of the New Mexico-Arizona Enabling Act has no compensable interest in the subject property. The Court's opinion and judgment was based on a probable anticipated lease period of 26 years. (R. 227).

ISSUES PRESENTED

I WHETHER THE ARIZONA SCHOOL TRUST FUND MUST BE COMPENSATED FOR THE TOTAL FULL APPRAISED VALUE OF ANY LAND TAKEN BY THE FEDERAL GOVERNMENT IN A CONDEMNATION ACTION

II WHETHER UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND SEC. 28 OF THE NEW MEXICO-ARIZONA ENABLING ACT AND OTHER APPLICABLE LAW A LESSEE OF ARIZONA'S SCHOOL TRUST LANDS HAS A COMPENSABLE INTEREST IN LEASED LANDS WHEN SAID LANDS ARE ACQUIRED BY CONDEMNATION PROCEEDINGS

III WHETHER UNDER SPECIFIC LEASE PROVISIONS THE LESSEE OF ARIZONA'S SCHOOL TRUST LANDS IS PRECLUDED FROM CLAIMING OR BEING AWARDED A COMPENSABLE INTEREST IN THE SUBJECT PROPERTY (OTHER THAN FOR IMPROVEMENTS) WHEN THE LAND IS ACQUIRED BY CONDEMNATION

IV WHETHER OR NOT A LESSEE HAS A COMPENSABLE INTEREST IN STATE SCHOOL TRUST LANDS, THE EXTENT OF THE LESSEE'S AWARD MAY NOT BE BASED ON A PROBABLE OR ANTICIPATED RENEWAL OF AN EXISTING LEASE ON SCHOOL TRUST LANDS

ARGUMENT

I

WHEN SCHOOL TRUST LANDS ARE TAKEN BY EMINENT DOMAIN, THE TRUST MUST BE COMPENSATED FOR THE TOTAL FULL APPRAISED VALUE OF THE LAND TAKEN BY THE FEDERAL GOVERNMENT

The Enabling Act grants made by the United States to the State of Arizona were made subject to the conditions imposed by Congress in the Enabling Act. Section 28 of the Act prescribes detailed conditions under which the granted lands were to be administered. This Section is set forth in Appendix A to the Petitioner's Opening Brief.

Article X of the Arizona Constitution is practically a rescript of Section 28 of the Enabling Act. Under Section 1, Arizona accepted the lands. This section states:

> All lands expressly transferred and confirmed to the State by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the State and all lands heretofore granted to the Territory of Arizona, and all lands otherwise acquired by the State, shall be by the State accepted and held in trust to be disposed of in whole or in part, only in manner as in said Enabling Act and in this Constitution provided, and for the several objects specified in the respective grant-

> ing and confirmatory provisions. The natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

The terms of sales, including the provisions for appraisal, advertising, public auction and sale are set forth in Sections 3, 4, 5, and 9. Sections 2 and 8 relate to the effect upon sales if there is non-compliance with the Enabling Act and provisions of the Constitution. These sections state:

> Section 2. Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands (or the lands from which such money or thing of value shall have been derived) were granted or confirmed, or in any manner contrary to the provisions of the said Enabling Act, shall be deemed a breach of trust.
>
> * * *
>
> Section 8. Every sale, lease, conveyance, or contract of or concerning any of the lands granted or confirmed, or the use thereof or the natural products thereof made to this State by the said Enabling

> Act, not made in substantial conformity with the provisions thereof, shall be null and void.

Under the above provisions, the State can only dispose of the trust and institutional lands in conformity with the provisions of that Act and Constitution. The terms of these documents require an appraisal, advertising, public auction and sale to the highest and best bidder. These provisions for sale were carried forward to the statutes by our Legislature. (Art. 3, Ch. 2, Title 37, Arizona Revised Statutes).

The United States Supreme Court in Lassen v. Arizona, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967), considered the applicability of the Enabling Act upon the administration of Arizona trust and institutional lands. The questions presented to the Court which related to the condemnation of school trust lands by the Arizona State Highway Department were as follows:

1. Must the State of Arizona, in converting school trust lands to another public use, follow the advertising, auction and sale procedures for

disposition of such land as set forth in Sec. 28 of the Enabling Act?

2. What standard of compensation must be employed to recompense the trust for land which through an eminent domain action is converted to another public use?

In responding to the first question, Mr. Justice Harlan, speaking for the Court, observed that the restrictions on the sale of the trust land under Section 28 of the Enabling Act were imposed to prevent exploitation of the trust for private advantage and to guarantee that the trust received appropriate compensation for the trust lands; requiring strict adherence to the Enabling Act disposition requirements when the land was being acquired by the State would sanction an empty formality. In view of the fact that after a sale the State could condemn land which it failed to purchase at auction, the Court observed that it "could not see that the trust would materially benefit from this circuity." Lassen v. Arizona, supra, at 587. The Court concluded:

> We conclude that it is consonant with the Act's essential purposes to exclude from the restrictions in question the transactions at issue here. The trust will be protected, and its purposes entirely satisfied, if the State is required to provide full compensation for the land it uses. We hold, therefore, that Arizona need not offer public notice or conduct a public sale when it seeks trust lands for its highway program. The state may instead employ the procedures established by the Commissioner's rules, or any other procedures reasonably calculated to assure the integrity of the trust to prevent misapplication of its lands and funds.
>
> 87 S.Ct. at 588.
> (Emphasis supplied)

The State of Arizona submits that under the authority of , and the guidelines set forth in the Lassen decision, federal condemnation procedures or direct sales to the federal government are a proper vehicle for the sale of State trust lands so long as the State is provided full compensation for the lands which assure the integrity of the trust.

A direct sale to the federal government is authorized in the Lassen case and under Arizona Revised Statutes (hereinafter cited as A.R.S.) § 37-232 which provides in part as follows:

> A person desiring to purchase state lands, or the lessee of any leased school or univeristy land entitled to reimbursement for improvements thereon, may make a verified written application to the state land department.

Under this circumstance the sale would take place upon completion of an appraisal and a determination that the interest of the state would not be prejudiced thereby, which under threat of condemnation would be at best highly unlikely. (A.R.S. § 37-236). In the event the land is sold, the lessee has no right to receive any portion of the sale price of the land, but is only entitled to receive the appraised value of the improvements which were placed on the property with the approval of the State Land Commissioner. (A.R.S. § 37-242.A). Under this procedure the school trust account receives the full appraised value of the land being sold for public purposes. Had the federal government made application to purchase the land, the purchase price which the trust would have realized is $115,020. Any transaction, condemna-

tion or otherwise, which results in a lesser amount being deposited to the school trust account results in a sale or other disposal of lands from the trust at less than the true appraised value and is expressly prohibited by Section 28 of the Enabling Act.

The second question considered in the Lassen decision, (what standard of compensation must be employed to recompense the trust in condemnation proceeding) is determinative of the question of distribution presented here. In the factual circumstance of the Lassen case, the Arizona Highway Department, under authority of decisions from the Arizona Supreme Court, attempted to acquire rights of way for highway purposes across school trust lands without compensating the trust for the value of the lands taken. The theory of the Highway Department and the Arizona Supreme Court was that integrity and res of the trust was being maintained by the enhancement and increase in value of the remaining trust lands after the highway improvement. In the Lassen opinion the Court rejected the enhance-

ment theory of compensation and further observed:

> The Enabling Act unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given. First, it requires that before trust lands or their products are offered for sale they must be "appraised at their true value" and that "no sale or other disposal . . . shall be made for a consideration less than the value so ascertained . . . ." The Act originally provided in addition that trust lands should not be sold for a price less than a statutory minimum. Second, it imposes a series of careful restrictions upon the use of trust funds. As this Court has noted, the Act contains "a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose." Ervien v. United States, 251 U.S. 41, 47, 64 L.Ed. 128, 130, 40 S.Ct. 75. The Act thus specifically forbids the use of "money or thing of value directly or indirectly derived" from trust lands for any purposes other than those for which that parcel of land was granted. It requires the creation of separate trust accounts for each of the designated beneficiaries, prohibits the transfer of funds among the accounts and directs with great precision their administration. "Words more clearly designed . . . to create definite and specific trusts and to make them in all respects separate and independent of each other could hardly have been chosen." United States v. Ervien, 246

F. 277, 279. All these restrictions in combination indicate Congress' concern both that the grants provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust.

87 S.Ct. at 588-89
(Emphasis supplied)

The Court further stated:

Nothing in these restrictions is explicitly addressed to acquisitions by the State for its other public activities; the Enabling Act is, as we have noted, entirely silent on these questions. We must nevertheless conclude that the purposes of Congress require that the Act's designated beneficiaries "derive the full benefit" of the grant.

87 S.Ct. at 589
(Emphasis supplied)

The Court therefore held:

We hold therefore that Arizona must actually compensate the trust in money for the full appraised value of any material sites or rights of way which it obtains on or over trust lands. This standard most clearly reproduces the results of the auction prescribed by the Act, and most consistently reflects the essential purposes of the grant.

87 S.Ct. at 590
(Emphasis supplied)

Applying the provisions of the Enabling Act and the Lassen opinion to the distribution of the proceeds in the present case, Arizona submits that in a condemnation proceeding the only way the integrity of the trust can be fully protected, the results of an auction most nearly reproduced and the full benefit of the grant derived is by awarding the full appraised land value, as determined by appraisal, to the State Land Department for deposit to the trust accounts. To award a lessee a portion of the award in a condemnation action which he could not under any circumstances receive in a direct sale of the subject property is not by any measure a standard which most nearly reproduces the result of the auction. The conclusion that Arizona had no authority to grant Alamo compensable interest in school lands and Alamo has no interest in the land entitling it to compensation, set forth by the Ninth Circuit Court of Appeals, is correct. The trust must receive the full appraised value of the land taken in a condemnation action.

ARGUMENT

II

THE LESSEE OF ARIZONA'S SCHOOL TRUST LANDS HAS NO COMPENSABLE INTEREST IN LEASED LANDS WHEN SAID LANDS ARE ACQUIRED BY CONDEMNATION PROCEEDINGS

Arizona is well cognizant of the requirement that the Fifth Amendment of the Constitution of the United States requires that private property may not be taken for a public use without just compensation. However, in exercising the authority of eminent domain, it must first be established that claimants to a just compensation are owners of the land. The term "owner" includes any party having a compensable interest in the land which is the subject of the acquisition. 2 Nichols, Eminent Domain, § 5.1[3], pp. 5-22, 23. Under the Fifth Amendment only the owners of interests in the property are entitled to compensation. U.S. v. Honolulu Plantation Co., (CA Hawaii 1950)182 F.2d 172, cert. denied 340 U.S. 820, 71 S.Ct. 51, 95 L.Ed. 602; Hunter v. U.S., 159 Ct. Cl. 356 (1962). The federal government must only compensate for a legally recognized interest in real property. U.S. v. Petty Motor Co., 327 U.S. 372,

66 S.Ct. 596, 90 L.Ed. 727 (1946).

The Ninth Circuit Court of Appeals was correct in its observations that while the Fifth Amendment prohibits the taking of private property without just compensation, this provision only guarantees to Alamo the right to compensation if they had obtained from Arizona a property right superior to or equal to the trust. However, under the Enabling Act, Arizona, as trustee, had no power to grant a compensable property right to Alamo. Alamo therefore never acquired a property right for which it is entitled compensation.

This conclusion is supported by provisions of Sec. 28 of the New Mexico-Arizona Enabling Act, which provides in part:

> No mortgage or other encumbrance of the said lands, or any part thereof shall be valid in favor of any person for any purpose or under any circumstance whatsoever.

An encumbrance has been defined as every right or interest in the land or estate which may subsist in another to the diminution of its value, or anything which impairs the use or transfer of or burdens the

title to such land or estate. Burns Trading Corp. v. Blue Front Market, 85 A.2d 320, 324, 17 N.J. Super. 61 (1951). A lease of land, which by its terms would not expire until after some time after delivery of a deed for realty is an encumbrance. Hecketsweiler v. Parrett, 200 P.2d 971, 974, 185 Or. 46 (1948); City of San Antonio v. Guadelupe-Blanco River Authority, (Tex. CA) 191 S.W.2d 118, 124. An encumbrance is an interest in land which may subsist in a third person to diminution of value of land but consistent with the passing of the fee by conveyance, hence an outstanding lease for a period of years is an encumbrance. Hartman v. Drake, 87 N.W.2d 895, 898, 166 Neb. 87 (1958).

Thus the present case is one in which a lease is specifically authorized by Sec. 28 of the Enabling Act which also prohibits the sale of the land unless the trust is compensated for the full appraised value of the land, and further restricts the lease from constituting an encumbrance insofar as the lessee's obtaining a

compensable interest or vested right in the property. While the lessee has a possessory right, so long as the state continues to determine that it is in the best interest of the trust to lease the land for a particular purpose, the lessee can have no rights which permit him to participate in the proceeds of the value of the land in the event the property is sold.

Arizona recognizes that a lessee of state school trust land under Arizona Statutes has a preferential right to renewal of a lease of state lands over other applicants for the lease. Such preferential rights are contained in A.R.S. § 37-291 (Appendix to Petitioner's Opening Brief at 10).

As is readily apparent after reading the statute, preferential rights of renewal are rights granted to a lessee only after the determination has been made by the State Land Commissioner that it is in the best interest of the state to re-lease the land in question.

The Arizona Supreme Court in Manning v. Perry,

48 Ariz. 425, 62 P.2d 693 (1936), considered the preferential right of renewal as it applies to the State, a lessee and an adverse claimant. Therein the Court stated:

> It is quite true that the preferred right to a renewal of a lease is not a contractual right between the lessee and the state, enforceable as against the state. If it were, the prohibition in the Enabling Act (section 28) against the leasing of the state's public lands for a period of longer than 5 years without advertisement could be evaded. So, as between the state and the lessee, this provision of the law gives no right. When, however, the Land Department is called upon to decide to which of two or more conflicting applicants a lease to state land shall be given, this statutory preference right can, and should, be considered by the department.

As between the state and the lessee, the preferential right to renew may be enforceable after the decision to re-lease the land has been made; however, the right cannot be considered to be a contractual right enforceable against the state and a subsequent purchaser, thereby entitling a lessee to participate in the proceeds of the sale. To so conclude would validate an encumbrance in specific

violation of Sec. 28 of the Enabling Act.

Alamo relies on the case of Ehle v. Tenney Trading Co., 56 Ariz. 241, 107 P.2d 210 (1940), to support the argument that the lessee has a compensable interest in state school trust property, noting that the case upheld the preferential right to renewal, recognizing that it is a "valuable, substantial right." (Petitioner's Opening Brief, p. 8, f. 12; p. 11). The Ehle case arose between two lessees after a determination to lease the trust property had been made. The case did not involve any consideration of rights a lessee might have in trust land as against the state itself. Recognizing that a lessee has a substantial right as against other potential lessees can in no way support the conclusion that a lessee has a compensable interest in the property in the event of a sale. If such were the conclusion, the Ehle case must be deemed to have been overruled by the Lassen case, supra.

Alamo also argues that Nebraska v. United States, 164 F.2d 866 (CA 8th Cir.), cert. denied 334 U.S. 351

(1948), which concluded that Nebraska school lands must be treated as any other private property and just compensation for such lands taken by condemnation must be allocated or apportioned between the state and a lessee on the basis of their relative values should be followed here. The case was determined nearly 20 years prior to the Lassen case. As correctly recognized by the Ninth Circuit Court, the Nebraska case can be readily distinguished from the present because the Nebraska Enabling Act contains none of the restrictions on sale or disposal of school trust lands that are contained in Sec. 28 of the New Mexico-Arizona Enabling Act.

Sec. 7 of the Nebraska Enabling Act, U.S. Stat. at Large, Vol. 13, p. 47, provides as follows:

> And be it further enacted, That sections number sixteen and thirty-six in every township, and when such sections have been sold or otherwise disposed of by any Act of Congress, other land equivalent thereto, in legal sub-divisions of not less than one quarter section, and as contiguous as may be, shall be and are hereby, granted to said state for the support of the common schools.

With a lack of any congressionally imposed restrictions relating to the sale or disposal of the lands, the 8th Circuit Court's decision in Nebraska v. U. S., supra, appears to be correct and consistent with the Lassen case as well as the decision of the Ninth Circuit Court. In light of the congressionally imposed trust restrictions on Arizona's school trust lands, and the Lassen decision, Nebraska v. U.S. cannot have any application to the instant case.

It is particularly interesting to note that while the Nebraska Enabling Act, supra, does not contain any specific trust restrictions on disposal or sale of the school property, a trust was nevertheless implied in the case of U.S.A. v. 78.61 Acres of Land, 265 F.Supp. 564 (D. Neb. 1967). By applying the Lassen decision to the Nebraska school lands, the Court required the Bureau of Reclamation to pay for rights of way over Nebraska's school lands.

Since the Lassen case, supra, the trend appears to be toward strict enforcement of trust restrictions on school trust lands. E.g., see Farmers Investment

Co. v. Pima Mining Co., 111 Ariz. 56, 523 P.2d 487 (1974). The instant case should not be an exception.

Alamo relies on State ex rel Highway Comm'n v. Chavez, 80 N.M. 394, 456 P.2d 868 (1969). This case is apparently relied on for the proposition that a lessee has a compensable interest in state public lands. It is not clear whether the lands involved were New Mexico school trust lands, so it can only be concluded that if trust lands were involved, the question of whether the trust restrictions precluded a lessee's right to participate in a condemnation award was not litigated.

State ex rel State Highway Comm'n v. Chavez, 77 N. M. 104, 419 P.2d 759 (1966), cited by Alamo, involved a lessee's right to participate in a condemnation award, but here the decision was reached prior to the United States Supreme Court's consideration and findings in the Lassen case, and has no apparent application to trust lands.

Construing other Arizona statutes cited by Alamo with Sec. 28 of the Enabling Act provisions

demonstrates the arguments set forth by Alamo regarding Arizona statutes are invalid. By enacting A.R.S. § 41-511.06 (Petitioner's Opening Brief, Appendix B, p. A-12) authorizing the Arizona State Parks Board to acquire property for State Park purposes, the Arizona Legislature required that the Parks Board pay the lessee of state and federal land when acquiring the property for Park purposes. Without addressing the State constitutional problems raised by the statute,[1.] this statutory provision cannot permit interference with the Enabling Act requirement that the trust be compensated for the full value of the land taken through eminent

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1. Article 9 § 7 of the Constitution of Arizona prohibits donation or grant of State property; whether A.R.S. § 41-511.06, which requires payment for a property interest which may not be legally compensable violates this State constitutional provision, has not yet been tested in the Arizona judicial system.

domain. Consequently, under this statute the lessee's interest must be compensated in addition to payment to the trust of the full appraised value of the land.

A.R.S. § 37-231 (Petitioner's Opening Brief, App. B, p. A-6) requires appraisal of land prior to sale and is totally consistent with Sec. 28 of the Enabling Act requirements and Constitution of Arizona requirements cited, infra.

A.R.S. § 37-242 (Petitioner's Opening Brief App. B., p. A-6) creates the vehicle for protecting the lessee in the value of his improvements when that land is sold and is authorized by Sec. 28 of the Enabling Act. When the improvements are sold with the state land on installments, the state pays the lessee for the improvements from the general fund. No school trust monies are affected. Title to the trust land does not pass until the certificate of purchase for the land is fully paid or a partial patent is issued.

A.R.S. § 37-284 (Petitioner's Opening Brief App. B, p. A-7) establishes the method and procedure

for determining which of several applicants is entitled to lease a parcel of trust land; this statute is controlled by Manning v. Perry, supra, and is only applicable after a decision has been made to lease the particular parcel.

A.R.S. § 37-288 (Petitioner's Opening Brief App. B, p. A-8) only relates to the forfeiture of leases and delinquent payments and does not expand or limit a lessee's rights acquired under the lease and Sec. 28 of the Enabling Act.

A.R.S. § 37-290 (Petitioner's Opening Brief App. B, p. A-9) establishes a preferential right to lease land which has been reclassified. The statute does not require the land to be leased again, but gives the Arizona State Land Commissioner discretion to determine whether the sale, re-lease, or use of the land in any other manner is in the best interest of the trust. Consequently, A.R.S. § 37-290 is subject to the courts' direction set forth in Manning v. Perry, supra.

A.R.S. § 37-293 (Petitioner's Opening Brief, App. B, p. A-11) protects the lessee in the value of the improvements, as authorized, but does not permit

the lessee to claim an interest in the value of the land.

None of the Arizona statutes cited by Alamo are inconsistent with the provisions of Sec. 28 of the Enabling Act.

Any rights granted to a lessee under A.R.S. § 37-291 regarding preferential rights to renewal are not enforceable as against the State upon the sale of the property. Manning v. Perry, supra; Lassen v. Arizona, supra. To conclude otherwise would violate the specific provisions of the Enabling Act and would be contrary to the express language in the Lassen case.

The case which, in addition to the Lassen case, supra, is most determinative of the issue regarding a lessee's right to compensation for school trust land is U.S. v. Fuller, 409 U.S. 488, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973). The arguments of Alamo regarding Fifth Amendment rights are totally rejected by the Fuller case which set forth the principle that payment need not be made for the added value to lands which are used in combination with lands to which rights may have been destroyed under the exercise of governmental authority other than the exercise of

eminent domain. Alamo's use of the state governmental lands was not absolute; under the provisions of the lease (Record on Appeal, p. 185 ¶ P), the lease could be cancelled or sold through reclassification. Additionally, under A.R.S. §§ 37-232 and 233 (Appendix A), any state trust land may be sold upon application of any person desiring to purchase state land (including trust land) or any lessee of school or university trust land entitled to reimbursement for improvements may make application to purchase the land. To conclude that the lease rights continue under those circumstances would constitute an "encumbrance" as discussed, infra, and would constitute an encumbrance in violation of § 28 of the Enabling Act.

The lease provisions (R. 185, ¶(Q) specifically provides ". . . no provisions of this lease shall create any vested right in the lessee herein." The intent of Congress in setting forth trust restrictions under § 28 of the Enabling Act and Arizona's inclusion of a specific lease provision clearly setting forth that no vested right be created in the lessee, precludes the lessee from claiming a compensable interest in the property on either direct sale or

sale through eminent domain. This is consistent with the dictates of U.S. v. Fuller, supra, as they relate to Taylor Grazing Act lands. 409 U.S. at 494.

The recitation in the Fuller case, supra, of language from United States v. Rands, 389 U.S. 121, 88 S.Ct. 265, 19 L.Ed.2d 329 (1967), is also particularly pertinent. In Fuller it is stated:

> . . . The Court's statement in Rands respecting portsite value is precisely applicable to respondents' contention here that they may aggregate their fee lands with permit lands owned by the Government for valuation purposes:
>
> "[I]f the owner of the fast lands can demand port site value as part of his compensation, 'he gets the value of a right that the Government in the exercise of its dominant servitude can grant or withhold as it chooses . . . . To require the United States to pay for this . . . value would be to create private claims in the public domain." 389 U.S. at 125, 19 L.Ed.2d 329, quoting United States v. Twin City Power Co., 350 U.S. at 228, 100 L.Ed. 240.

35 L.Ed.2d at 21.

Alamo is attempting here to require the United

States to pay for land in which the lessee has no vested interest and would create private claims in the state school trust lands granted to Arizona under the Enabling Act. The Fifth Amendment does not require it. Sec. 28 of the Enabling Act does not permit it.

Alamo argues that the fact that the state land in question is isolated supports the position that the land is relatively of no value unless used in conjunction with other property owned or controlled by Alamo. This certainly was not the conclusion of the United States appraiser who appraised the land as separate parcels independent from the Alamo ranch operation. Further, in Arizona the state as well as private landowners may exercise the authority of eminent domain for private way of necessity under A.R.S. §§ 12-1201 and 1202 which provide as follows:

> § 12-1201. Private way of necessity defined
>
> "Private way of necessity" as used in this article means right of way on, over, across, or through the land of another for means of ingress and egress,

and the construction and maintenance thereon of roads, overhead transmission lines, pole line, power lines, canals, ditches, flumes, shafts, tunnels, pipe lines, drains, including, but not limited to, embankments, diversion dams, dikes, ditches, canals, flumes and levees for the purpose of removing water from land or preventing accumulation of water on land, and tramways, including, but not limited to, aerial tramways and industrial railroads, for mining, milling, lumbering, agricultural, domestic or sanitary purposes.

§ 12-1202. Right to private way of necessity; limitation

A. An owner of or a person entitled to the benefi cial use of land, mines or mining claims and structures thereon, which is so situated with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity over, across, through, and on the premises, may condemn and take lands of another, sufficient in area for the construction and maintenance of the private way of necessity.

B. If the condemnation is upon, over, or affects the range lands of another, the area condemned shall be strictly defined, and livestock driven upon or over the private way shall be accompanied by and under the control of sufficient drivers or herders to confine the livestock to the condemned area, and the livestock shall be so confined to that area and kept moving directly across the property condemned until they have been completely removed from the condemned area.

Alamo further argues that enhancement of the state lands because of use in conjunction with lessee's other holdings enhance the value of the state lands thereby creating that increased value. This is certainly an attempt to pick one's self up by the bootstraps to claim a vested compensable interest in state trust lands. A similar attempt was rejected in the Fuller case, supra. Additionally, there was no appraisal evidence regarding enhancement. The only testimony presented was the speculation presented by Alamo's witness, W.D. Davis, who did not appraise the property. There is therefore no appraisal evidence to support Alamo's enhancement argument and it should not be considered. Ramsey v. United Mine Workers of America, 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed.2d 64, on remand 481 F.Supp. 1029, appeal after remand, 481 F.2d 742, cert. denied 414 U.S. 1067, 94 S.Ct. 576, 39 L.Ed.2d 473, discussion under sylabus 4, 91 S.Ct. 658, 664, 665.

If Alamo has a compensable interet in the subject property, only then is it entitled to argue that

the appraisal concept of enhancement applies to the land in question and should be the basis for increasing an award for Alamo. See 2 Nichold, Eminent Domain, § 5.1[3] which sets forth that an "owner" claiming compensation must have a compensable interest in the property subject to acquisition.

The representations made by Alamo and Amicus Curiae Brief in support of petiton for certiarari by the Federal Land Bank of Wichita and the Federal Intermediate Credit Bank of Wishita and many listed production credit associations and the Amicus Curiae Brief of the State of New Mexico attempt to ignore the restrictions set forth in Sec. 28 of the New Mexico-Arizona Enabling Act which rejects the validity of any mortgage or encumbrance against the land. It seems these Amicus Curiae are attempting to have this Court extracate them from the problems created by their poor business judgment at the expense of the school trust. Secondly, Arizona submits that the fact that the loans are probably secured by the private property as well as improvements on the state property and that the loans are based on ability of

the rancher to produce sufficient revenue to retire the loan rather than the market value of the property, demonstrate that the allegations of loan losses are hollow. In any event the fact that the lessee placed a mortgage on his business operation, private land and improvements is not sufficient basis to declare a legally compensable interest in a lessee.

There is no legal authority which creates or vests any leasehold rights in Arizona's school trust lands in a lessee or which entitles a lessee to participate in a condemnation award relating to land values. The decision by the Ninth Circuit Court of Appeals which determines that the state has no authority to grant a compensable interest to the lessee is correct and should be affirmed.

ARGUMENT

III

UNDER SPECIFIC PROVISIONS OF THE LEASE A LESSEE OF ARIZONA'S SCHOOL TRUST LANDS IS PRECLUDED FROM CLAIMING A COMPENSABLE INTEREST IN THE SUBJECT PROPERTY (OTHER THAN FOR IMPROVEMENTS) WHEN THE LAND IS ACQUIRED BY CONDEMNATION

It is recognized that in a condemnation action, specific provisions of a lease control a lessee's right to receive compensation or to participate in the condemnation award. United States v. 15.3 Acres of Land, 154 F.Supp. 770 (D.Ct. Pa. 1957). A lessee is charged with the knowledge that a lease may be terminated under provisions of the lease and the applicable law. U.S. ex rel Tennessee Valley Authority v. Birmingham Ferry Co., 79 F.Supp. 569 (D.Ct.Ky. 1948).

An examination of the specific provisions in the instant case defeats any right Alamo may have in the condemnation award as it relates to other than the value of the improvements. The lease at issue here specifically provides the following:

> (1) IT IS HEREBY COVENANTED AND AGREED by both parties hereto, that this lease

> is issued subject to all the provisions and requirements thereto, which are found in the various Acts of the Legislature of the State of Arizona, the same as though they were fully set forth herein.
>
> (Record on Appeal) p. 182
>
> and (2) (H) That the lessor saves and reserves the right to relinquish to the Federal Government, at any time, the State's right of claim to any part of the land described herein, and thereupon this lease will be null and void insofar as it relates to the land the State has so relinquished.
>
> (3) (P) This lease is offered by the lessor and is accepted by the lessee with the express understanding, notwithstanding any provisions herein to the contrary, that it may be terminated by the State Land Commissioner upon thirty (30) days written notice at any time as to any land which may be reclassified as agricultural, commercial or homesites. The State Land Commissioner expressly reserves complete discretion in respect thereto.
>
> (4) (Q) The terms, conditions and covenants of this lease are subject to present laws relating to state lands and the rights of both lessor and lessee hereunder are each and all subject to such modification as may be consistent with such amendments, revisions or repeals of existing laws as may hereafter be made, and no provision of this lease shall create any vested rights in the lessee herein.
>
> (Record on Appeal p. 185

In condemnation the federal government has the responsibility to only compensate for legally recognized interest in real property. U.S. v. Petty Motor Co., supra.

The supplemental condition (4)(Q) of the lease supra, specifically provides that the lease creates no vested rights in the lessee. This specific provision of the lease impliedly constitutes a condemnation clause and is not a legally recognized interest in real property which entitled a lessee to participate in a condemnation award. The only recognized interest in school trust lands belongs to the state school trust.

Further, A.R.S. §§ 37-242 and 37-293 (Petitioner's Opening Brief, App. B. pp. A-6,-11) restrict a lessee's participation in the proceeds of a sale of the land to the value of the improvements. By specific inclusion of these applicable laws on sale of the property (by condemnation or otherwise) the lessee is precluded from receiving anything but the value of the improvements on the subject property. Adding consideration of the termination provision, and the provision for relinquishment to the federal government

and the Lassen and Fuller cases, supra, it should only be construed that the lease provisions preclude the lessee from claiming a compensable interest in the subject property.

The Ninth Circuit Court of Appeals did not find it necessary to reach this argument. Nevertheless, the argument defeats Alamo's claim to a right to participate in the condemnation award.

ARGUMENT

IV

IF LESSEE HAS A COMPENSABLE INTEREST IN STATE SCHOOL TRUST LANDS, THE EXTENT OF THE LESSEE'S AWARD MAY NOT BE BASED ON A PROBABLE OR ANTICIPATED RENEWAL OF AN EXISTING LEASE ON SCHOOL TRUST LANDS

Assuming, arguendo, that a lessee of state school trust property has a right to participate in the distribution of the award in condemnation of such property, it must be recognized that the congressional restraints imposed by Sec. 28 of Arizona's Enabling Act as interpreted by the Lassen case, must be followed in making a distribution of condemnation award, thereby assuring that the trust is compensated the true appraised value of the lessor's interest.

In proceedings below, the witness Davis, testifying on behalf of Alamo based his opinions of distribution on a capitalization of Arizona's income stream for a speculative period of 36 years, and the "present value" of the property at the end of a hypothetical lease period (projecting that the market value of the real property

in question would not increase in value during that period of time).

The method of determining the amount of rental which the State Land Department may charge on a grazing lease is set forth in A.R.S. § 37-285.B:

> All grazing land shall be classified and appraised on the basis of its animal carrying capacity. The annual rental rate for grazing land shall be the amount determined by multiplying the carrying capacity of the lands by the annual rental rate per animal unit. The annual rental rate per animal unit shall be twnety-two per cent of the average market price of cattle for the preceding year. The rental rates on all lands other than grazing lands shall be as determined by the commissioner, subject to the provisions of subsection A.

It is recognized that the rental received by the State Land Department on a grazing lease did not yield a sound economic return to the State when considered in light of the value of the land but rather constitutes a "bargain" to a lessee. (Deposition of W. J. Fish, Jr., Rowe Appraisal, Ex. D., pp. 12-13). This conclusion is also supported by an examination of the testimony of W. R. Davis. (T. 73-74). When the relationship of the rental value to the market

value of property is too remote to merit consideration, evidence of such rental value or of the existing rents which establish rental value is inadmissible and should not be used as a determination of valur. Olsen v. U.S., 67 F.2d 24, aff'd 292 U.S. 247, 54 S.Ct. 704, 78 L.Ed. 1236; Welch v. Tennessee Valley Authority, 108 F.2d 95, cert. den. 309 U.S. 648, 60 S.Ct. 889, 84 L.Ed. 1030. A determination of the value of school lands for the purpose of establishing a basis for the computation of rent to be paid by a lessee does not fix the value which the State is entitled to receive for the land when taken in eminent domain proceedings. Nebraska v. Platte Valley Public Power Irrigation Dist., 147 Neb. 289, 23 N.W.2d 300, 166 A.L.R. 1196. See also Am.Jur., Eminent Domain, §§ 240 et seq. In Nebraska v. Platte, it is recognized that the right of a lessee of state school land to a renewal of a lease if someone does not bid higher is not one that should be determinative of the value of a leasehold on a taking in eminent domain.

In Scully v. United States, 409 F.2d 1061 (10th

Cir. 1969), the Court considered the question of whether a compensable leasehold interest could be established by custom and usage. The Court stated:

> It is abundantly clear that to read a right of renewal into the present lease would not be a fair interpretation, even in view of an understandable sympathy for the lessee in this context. It is one thing to rely upon custom and usage to clarify incidental problems of lease interpretation, but it is quite another to extend the term or duration of the tenancy through such dubious means. Aside from the obstacle presented by the Statute of Frauds, it is necessary to reflect upon the additional confusion that would be created if all leasehold estates were extended in the face of explicit language to the contrary.
>
> 409 F.2d at 1065.

In the Scully case, the Court further concluded that in computing how a condemnation award should be divided between lessor and lessee, the mere expectation that a lease would be renewed does not add to the market value of land. In support of this conclusion, the Court cited two cases: U.S. v. Petty Motor Co., supra, where the Supreme Court noted that

"the fact that some tenants had occupied their leaseholds by mutual consent for long period of years does not add to their rights." (Id. at 380); and Emery v. Boston Terminal Co., 178 Mass. 172, 59 N.E. 763 (1901), wherein it was determined that in a condemnation action compensation paid for property held by a lessee could not include the value of an expectancy that a short term tenancy or lease would be renewed. The Court declared:

> Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of petitioner's holding, they could not be taken into account . . . . They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right.
>
> 59 N.E. at 765.

In the proceedings below, the witness Davis' direct testimony was predicated on an incorrect legal assumption. Mr. Davis capitalized the State's

(lessor's) rental receipts from the grazing lease based on an anticipated renewal, which is an invalid method of appraisal as set forth above. Recognizing a preferential right to renewal of state school trust lands is not a basis for increasing a lessee's term of lease, thereby diminishing the lessor's interest in the condemnation award. The observations of the witness Davis and the opinion and judgment of the District Court below should not be accepted by this Court as they incorrectly rely on an expectancy that a relatively short term lease will be renewed for up to three 10-year terms.

Assuming that Alamo has a compensable interest in this case, the only valid testimony concerning the marketability of such interest was elicited from the witness Davis on cross examination. He testified that cattle ranches in Arizona were usually sold on the basis of animal unit carrying capacity and that this is a valid and acceptable method of appraisal. He also testified concerning certain representative sales of cattle ranches where state land under lease

was included as part of the transfer. The sales indicated that a grazing lessee of state school trust lands could sell his interest in the leasehold on the open market for between $225 to $703 per animal unit carrying capacity. (T. 73-74, 83-84). The total carrying capacity for the two sections involved in this case is 8 animal units. Even assuming that this land is prime grazing land, which might yield top value per animal unit to Alamo in the sale of the leasehold, the maximum amount to which Alamo is entitled in this action is 8 animal units times $703 per unit, or $5,624 for the land and $3,600 for the improvements, a total of $9,224.

Other suitable alternatives available which could be adopted under a valid distribution were indicated in the Rowe appraisal (Ex. D, admitted into evidence) which establishes Alamo's interest in the bargain of the leasehold at $3,200 (plus the value of improvements for a total lessee's award of $6,800); or the distribution as determined by the witness William Fish, Jr., who concluded that

Alamo should receive only the value of the improvements which it placed on the subject property, taking into consideration the special provisions of the lease. (Exhibit B) and A.R.S. §§ 37-242 and 37-293 which implement the provisions of Sec. 28 of the Enabling Act authorizing a lessee to receive the value of improvements which he placed on the land in the event of sale or lease to another party.

The lessee's interest is very restricted under the specific terms of the lease. With a 30 day termination provision, the state's retaining the right to relinquish the land to the federal government and the express provision that the lease creates no vested right in the lessee, the determination of the Rowe appraisal or of the witness William Fish come closest to the legally compensable interest, if any, of the lessee. Arizona submits the amount of Alamo's portion of the condemnation award distributed by the District Court was excessive and constituted a windfall to lessee at the expense of the trust. Should this

Court determine that the lessee does have a compensable interest, it should be limited to one of the following: (1) either $9,224 under the Davis market data showing the value on the sale of state grazing leases based on $703 per animal unit, (2) $6,800 as advanced by the Rowe appraisal, or (3) $3,600 for improvements only.

CONCLUSION

In the case of U. S. v. Certain Property Located in Borough of Manhattan, 344 F.2d 142, (2d Cir. 1965), it was recognized that in condemnation actions the applicable law should not be applied in such a manner as to allow a lessee an "indefensible windfall".

In view of the specific provisions of the Enabling Act, applicable law and the provisions of the lease, to overturn the decision of the Ninth Circuit Court of Appeals would only result in an "indefensible windfall" to the lessee. Under NO other circumstances would lessee be able to participate in the proceeds of the sale of the land other than to recover the value of the improvements placed thereon. That the land is being acquired by eminent domain rather than by direct sale or auction does not relieve Alamo or Arizona from complying with the requirement of the Lassen case, supra, that the trust be actually compensated for the full appraised value of the land, using a standard which "most clearly reproduces the result of

the auction prescribed by the [Enabling] Act and most consistently reflects the essential purposes of the grant." 87 S.Ct. at 590. Concluding the Lessee of school trust lands has a vested compensable right in the value of trust land sold through eminent domain clearly does not reproduce the result of the auction and does not reflect the essential purpose of the grant. Therefore, Arizona respectfully submits that the decision of the Ninth Circuit Court of Appeals should be affirmed.

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APPENDIX A

Arizona Revised Statutes

§ 37-232. Application to purchase state lands or for reimbursement for improvements

A person desiring to purchase state lands, or the lessee of any leased school or university land entitled to reimbursement for improvements thereon, may make a verified written application to the state land department to purchase the land. The application shall contain the name, age and residence of the applicant and a description of the land sought to be purchased. If a lessee of school or university lands is the applicant, the application shall contain the date the lease of the land was issued to him. If the applicant has or claims the right of possession by instrument in writing from a former lessee, the application shall contain the name of his assignor or grantor, the date of the original lease and the date of the assignment, and he shall attach to his application the original instrument of assignment, or if lost, furnish proof of loss. If applicant claims by judgment of a court or by operation of law, he shall attach to the application a certified copy of the instrument giving him such right. If the application is by one claiming a right to reimbursement for improvements placed on leased school or university lands, he shall set forth in the application a list of improvements made upon the land.

§ 37-233. Sale of lands upon application; restriction on sale of timber land; expense of sale

A. Upon receipt of the application, the state land department, under the rules and regulations of the department, shall cause the lands to be sold if the sale of them is nor prohibited by law. Land

containing timber of a value which in the opinion of the commissioner should be sold separately from the land, shall not be subject to sale until after the timber is sold.

B. When an application is filed with the department for selection or sale of land under the laws of this state, the department determines that the benefit to be derived from the selection or sale is less than the expense involved, he may accept from the applicant an amount of money sufficient to pay the expense incidental to the selection or sale, but if the applicant fails to secure a lease after selection of land, or fails to purchase land after bidding for it, the successful lessee or purchaser shall reimburse the original applicant for all funds so advanced.

CERTIFICATION

PETER C. GULATTO, being duly admitted to practice before the Supreme Court of the United States, herewith certifies that three copies of the Respondent's Brief have been delivered to the following by depositing the same in the United States mail, postage prepaid, to:

J. Gordon Cook
11 West Jefferson Street
Phoenix, Arizona 85003
Attorney for Petitioner

Solicitor General
Department of Justice
Washington, D. C. 20530

Richard Allemann
Assistant U.S. Attorney
Federal Building
Phoenix, Arizona 85025

this 28th day of July, 1975.

Peter C. Gulatto

Subscribed and sworn to before me this 28th day of July, 1975.

Notary Public

My Commission Expires Oct. 18, 1978